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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 139

FRANKLIN PERRY,

Petitioner,

versus

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

MEYER J. SAWYER,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, Franklin Perry, prays that a writ of certiorari issue out of this Honorable Court to review the final judgment and decision of the United States Circuit Court of Appeals for the Tenth Circuit, entered on or about the 29th day of May, 1943 (R. 53), affirming the judgment and sentence of the District Court of the United States for the District of New Mexico (R. 12), wherein the petitioner was adjudged guilty of an offense under the Postal Laws, towit, Section 338, Title 18, U. S. C. A.

Statement of Facts.

Petitioner, Franklin Perry, was indicted in the United States District Court of New Mexico for violation of Sec. 338, Title 18, U. S. C. A. The indictment was in five counts

and after prosecution rested the court directed a verdict of not guilty as to the first three counts and submitted the case to the jury on counts four and five and the jury convicted petitioner on both of these counts and sentence was given thereon (R. 12).

The indictment charged the petitioner with having devised and intended to devise a scheme to defraud and obtain money and property by false and fraudulent pretense, representations and promises from William J. Dietrich, Albert W. Willauer, Mabel Willauer, and others, including the public generally (No evidence was offered or attempt made to support any charge of defrauding any persons other than those named above), by inducing them to pay money to the defendant for the purchase, recording and delivery of assignments of leases for oil and gas on State lands in New Mexico, and that pursuant thereto the defendant did make and cause to be made false and fraudulent pretenses and representations in order to induce the victim to pay the money for such leases (R. 1, 2).

The indictment further alleges (R. 2) that it was a part of the scheme and artifice that the defendant would and did, through the use of the Post Office * * * of the United States, purchase and obtain FROM AN OIL LEASE BROKER LOCATED IN SANTA FE, certain forms purporting to be gas and oil leases on lands situated in the State of New Mexico. That as a further part of the scheme, AFTER THE SALE OF SAID OIL LEASES TO THE VICTIMS, defendant did use and cause to be used the Post Office * * * of the United States in sending said oil leases to the office of the Commissioner of Public Lands of New Mexico for recording (No evidence of such mailing was offered to support this allegation) and for returning recorded oil and gas leases from said Commissioner to the victims. That as a further part of the scheme to defraud, the defendant would and did obtain,

FROM AND THROUGH AN OIL LEASE BROKER IN SANTA FE, a lease covering two thousand acres of land, and that said lease would be made by the Commissioner * * * as lessor, to said defendant as lessee and that defendant would and did make assignments of smaller tracts to the victims who could be induced by said defendant to pay their money; that it was further a part of the said scheme that defendant would and did represent and pretend that the oil leases which he had for sale to the victims WERE DIRECT LEASES FROM THE STATE OF NEW MEXICO; That the lands covered thereby were located in extremely active territory; that the development of oil leases in the immediate vicinity thereof was then and there being undertaken, and that the immediate territory would be proved within four months to one year; that by reason of the development being done, an opportunity then existed for the victims to resell any oil leases bought from the defendant at an enormous profit; that the defendant would sell such oil leases for the victims, if the victims would purchase the same from him *at large profits.*

It is further charged (R. 3) that each and every one of the said representations, pretenses, artifices, promises and devises were, as the defendant then and there well knew, false and fraudulent, in this:

(a) That the oil leases which the defendant had for sale WERE NOT DIRECT LEASES FROM THE STATE OF NEW MEXICO, but on the contrary were assignments of acreage in smaller tracts, from a lease which the defendant had procured FROM a LEASE BROKER in Santa Fe; that the leases so procured by the defendant did not cover lands in extremely active territory, but the lands were located where there was no development for oil in the immediate vicinity; that the immediate territory would not be proved within four months to one year; that no opportunity existed for the

victims to resell any oil leases bought from the defendant at an enormous profit; and that the defendant could not and would not resell such oil leases at large profits for the victims.

> (The foregoing is the gist of the charging portion of the indictment as set forth in Count 1, however, as aforesaid, counts 1-2 and 3 were not submitted to the jury, but because the general charging part of Count 1 is incorporated by reference in Counts 4 & 5, it has been included in the transcript (R. 1 to 3).

Count 4 alleges that the defendant having devised and intended to devise the scheme and artifice as set forth in Count 1, and for the purpose of executing and attempting to execute the same, did, on or about the 30th day of September, 1938, at Santa Fe, in the State of New Mexico and District of New Mexico * * *, unlawfully, willfully, knowingly and feloniously cause to be placed in the U. S. Post Office at Santa Fe, New Mexico, to be sent or delivered by the Post Office Establishment of the U. S., a certain writing enclosed in a postpaid envelope addressed to Albert W. and Mabel I. Willauer, Quakertown, Penn.

Count 5, after repeating the general allegations as set forth in count 4 and by reference the general charging portion of count 1, charges that, on or about, the 11th day of August, 1938, at Santa Fe, * * *, the defendant did unlawfully * * *, cause to be placed in the United States Post Office at Santa Fe, * * *, to be sent or delivered by the Post Office Establishment * * * a certain writing enclosed in a postpaid envelope addressed to William J. Dietrich, Allentown, Penn.

The petitioner claims and the Government's testimony showed without contradiction that he purchased the oil and gas leases DIRECT FROM the Sovereign State of New Mexico and that this Sovereign State sold the same to the petitioner

as oil and gas lands and charged and collected rent thereon as such; that said State by a State law, authorized him, the petitioner, to assign all or any part of the leased lands to prospective buyers; that upon such assignments the State would receive same and transfer the leased land from the petitioner direct to the buyers or assignees of the petitioner and that the leases set forth in counts 4 and 5 of the indictment were such assignments.

That the petitioner relying upon the representations of one of the Sovereign States of the Union, to wit, New Mexico, that the lands leased by petitioner were potential oil and gas lands, sold the same to the persons named in the Counts 4 and 5 as such and that he was indicted and convicted for selling and representing or repeating merely the representations made by the said State of New Mexico.

Petitioner further says that he sold the leases in the State of Pennsylvania; that he made no representations other than those based upon articles published by the State of New Mexico and opinions and honest beliefs learned through newspapers, oil journals and other sources which he had every reason to believe were authentic; that no testimony was presented at the trial which could constitute fraud or misrepresentation; that no testimony was produced to show that he ever MAILED OR CAUSED TO BE MAILED any letter or in anywise used or caused to be used the United States Post Office Establishment in completing the sale of said leases; that as aforesaid he was in Pennsylvania, never was in New Mexico, did not know any person living in New Mexico, never authorized or caused any person to use the mails, but on the contrary he made the sales in Pennsylvania and same were fully and entirely made and consummated within Pennsylvania and the assignees sent the leases to the Commissioner of Public Lands in New Mexico to be recorded for their own protection and that the Commissioner of Public Lands of New Mexico sent the

same to the parties mentioned in counts 4 and 5 as a public duty (R. 11); that the petitioner did not know the Commissioner of Public Lands and that petitioner could not have prevented said Commissioner from doing the only act set forth in the indictment as an act of using the mails because the said Commissioner acted solely under and by a law or rule laid down by the Sovereign State of New Mexico and further if the Commissioner of Public Lands did mail the State leases or assignments to the persons named in counts 4 and 5, (Willauer and Dietrich) such mailing was not using the mails in executing any scheme, for the said act of the Commissioner was done long after the petitioner had consummated the sale and the act of mailing, if done as alleged, was in no wise done "for the purpose of executing such scheme * * *" (words of the statute). If the record is carefully examined not ONE WORD will be found to even indicate that petitioner caused the Commissioner * * * to do any act of mailing. Not one person was called to testify that the assignments were mailed from the Commissioner's office and there is no presumption that petitioner caused the Commissioner to use the mails, if he did so use the mails. In prosecutions under Sec. 338, Title 18, U. S. C. A. the act of mailing must be proven beyond all reasonable doubt.

As aforesaid no person was called to prove actual mailing by any person. Five witnesses were used by the State, first, Ruth Piatt who merely testified regarding securing for petitioner, in her capacity as an Abstractor, leases direct from the State to the Petitioner in direct contradiction to the allegations of the indictment; secondly, Mabel Willauer and her husband, Albert W. Willauer, both living in Pennsylvania and had never been in New Mexico or knew the Commissioner of Public Lands; and third, William J. Dietrich, who likewise lived in Pennsylvania and those witnesses did not nor, could not, have testified regard-

ing any mailing done in New Mexico, and the only remaining witness, Alexander Andreas, a geologist, was not mentioned about mailing and did not mention mailing, *so there is not one word of testimony to show who mailed the assignments* or that they were, in fact, ever mailed and the Government failed to make out a case.

ARGUMENT.

Jurisdiction.

The only jurisdiction which the Federal Courts would have is based upon Sec. 338, Title 18, U. S. C. A. and the GIST of the offense is "USING of the MAILS" and the prosecution must prove its case not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis.

Beckman v. *U. S.*, 96 F. 2nd, 15,
Brady v. *U. S.*, 24 F. 2nd, 405,
Havener v. *U. S.*, 49 F. 2nd, 196.

> "In prosecution for using the mails to defraud, matter mailed must be step in attempt to execute the scheme."

Barnes v. *U. S.*, 25 F. 2nd, 61.

Even though there was a scheme to defraud and actual misrepresentations made if the mails were not used in the execution of the scheme the Federal Courts have no jurisdiction, so upon examination of the entire record in this case the very best case presented by the Government was: That after the petitioner had sold the leases as set forth in counts 4 and 5, the only counts submitted to the jury, and after the entire transaction had been fully and completely consummated in the State of Pennsylvania, petitioner had made the assignments and had been paid for same in full and the leases were delivered in Pennsylvania, the Com-

missioner of Public Lands of New Mexico, as a part of his public duty, mailed a copy of the recorded assignments to the persons named in counts 4 and 5. The original leases were not mailed by the Commissioner to the persons, only a copy and this copy in no wise aided the sale, effected the title or was the mailing of such copy done "For the purpose of executing such scheme" (words of the statute). If the Commissioner did mail these copies to the persons named it was merely to show that he, the Commissioner, had performed a duty imposed upon him by law. The recording and mailing in no sense of the word changed or effected the title to the assignments or aided petitioner in consummating the transaction, as the transaction was completed long before the Commissioner acted.

> "Where the charge and evidence shows that the mailing was done after the trasaction was fully consumated, no conviction can be had under Sec. 338, Title 18, U. S. C. A.
>
> *Dyhre* v. *Huspeth*, 106 F. 2nd, 286.

Fatal Variance:

The indictment charges that "It * * * was a part of said scheme and Artifice to defraud that the defendant would, and did, OBTAIN FROM AND THROUGH AN OIL LEASE BROKER IN SANTA FE, * * * a lease covering approximately two thousand acres of land", and "it was further a part of said scheme and artifice to defraud the victims that the defendant would, and did, represent and pretend that he could acquire FROM THE STATE OF NEW MEXICO an oil lease * * * That each and every one of the representations, pretenses, artifices, promises and devises were, as the defendant then and there well knew, false and fraudulent, in this: (a) That the oil leases which the defendant had for sale WERE NOT DIRECT LEASES FROM THE STATE OF NEW MEXICO (E. 3), but to the contrary were * * * from a lease

which the defendant PROCURED FROM A LEASE BROKER IN SANTA FE."

In a simple statement the indictment charged the petitioner with representing falsely that he was selling oil and gas leases which were made directly by the State of New Mexico, when in truth, he did not have leases direct from the State, but had procured them from an oil broker in Santa Fe.

Now the Government's proof showed beyond all question of doubt that the petitioner HAD AND SOLD ONLY LEASES ON STATE LANDS WHICH HE HAD SECURED DIRECT FROM THE STATE OF NEW MEXICO and that he never had offered for sale or sold a single acre of leased land, which he had procured from an OIL LEASE BROKER in Santa Fe or elsewhere and in the prosecutors brief, page 7, speaking of this variance, he says:

> "It is true that the proof, as to this point, does not conform with the allegations of the indictment, but we submit that the VARIANCE is immaterial * * *".

Here the very statement which the indictment charges was the misrepresentation, to wit, selling a lease that was obtained from an oil broker and not from the State direct and representing that it was a lease Direct from the State and yet the prosecutor says that the allegation which he set forth with such certainty and exactness need not be proven, but that he can prove just the opposite and that there is no variance.

The petitioner came into court to meet a charge that he defrauded Mabel and Albert Willauer (Count 4) and William Diethrich (Count 5) by representing to them that he was selling to them an oil lease which he had procured direct from the State of New Mexico when in truth he had not procured a lease direct from the said State, but had, and was selling, them a lease which he had procured from

an oil lease broker and the inference was that thereby the petitioner was selling an inferior lease or leases, but the evidence showed that the leases were exactly as represented, to wit, State Leases, oil and gas leases sold by the Soverign State of New Mexico as potential oil and gas lands, Direct to the defendant.

It might not have been necessary for the pleader to have stated how the leases were procured, but having said it and having made the statement the basis of the misrepresentation he must prove it as charged and when his own witnesses prove the exact opposite there is a fatal variance if there was ever such in a criminal case. This is the most glaring variance possible, to state a proposition and prove the direct opposite.

No Evidence of Devising a Scheme or Artifice to Defraud.

As a matter of actual fact the only basis of any fraud was the selling of a lease obtained from an oil broker and representing that it was a lease procured direct from the State and the prosecution admits that it failed to prove this allegation, but by its own witnesses, Ruth Piatt and Alexander Andreas, the Government disproved its charge of misrepresentation in this regard. The other allegations about the leases being in the vicinity of development is a mere opinion as to what constitutes vicinity in an oil field and as to the value of the leases sold the claim that the parties mentioned in counts 4 and 5 did not or could not have made big or large profits is belied by the Government's own witnesses, Willauers testified (R. 24, 26) that they paid $500.00 for the leases and within short time thereafter refused to sell the same leases for $1,000.00 or 100% profit on the transaction and this is big profits or in the words of the indictment "Large Profits" which the indictment says the petitioner said the buyers would make by purchasing the leases from him.

1. Now your petitioner claims that the District Court of the United States for the District of New Mexico had no jurisdiction as there was NO PROOF of mailing by the petitioner or of the petitioner causing the mails to be used and that the only use of the mails, and this was not properly proven by a word of testimony, was the act of a public official in the line of his duty sending to the owners copies of recorded State leases on State owned lands, or in other words mailing out copies of State records.

2. The Government set forth in the indictment a charge that the petitioner was misrepresenting the lands which he was selling as State Lands or leases, when they were not State leases, but were leases that petitioner had procured from an oil lease broker in Santa Fe and the Government proved and admitted that the petitioner was selling only State leases and had not procured the leases from any oil broker and the variance was/is fatal.

3. The Government alleged that the scheme and artifice to defraud was the selling of leases on oil and gas lands and representing that they were oil and gas lands and the proof showed that the State of New Mexico leased the lands to the petitioner as oil and gas lands and charged rents thereon as such and the petitioner could hardly be held for repeating or restating the State's claims, and that to be guilty of a crime by having faith in a representation of a State seems to violate the spirit of the constitution.

4. The Government alleged that the petitioner represented that the leased lands he sold were in the vicinity of Development and the proof showed that the lands were near large tracts owned by major oil companies and at best the Government's evidence showed mere salesman's boosting, based upon newspaper, oil journals and representations made by the State of New Mexico and in this connection, to use the statement of a Florida jurist: "No man can say

positively that there is oil under any particular tract, such representations that there is oil on certain lands is, at best, the speaker's opinion and does not amount to misrepresentation."

5. The indictment alleges that the leases were represented as valuable and that the buyers could sell same at large profits and the testimony by the Government showed that the leases which the petitioner sold for $500.00 could have been sold by the buyers for $1,000.00 or a profit of one hundred per cent within a short time after buying and that the buyers refused to sell, by inference proving that the leases were valuable and that large profits could have been made by the persons named in the indictment, counts 4 and 5, so that no person was, in fact, defrauded.

6. Petitioner respectfully submits that the Government did not sustain its claims and prove a case sufficient to have warranted the Court in submitting same to a jury and that the Court erred in not directing a verdict of not guilty on all counts.

7. Lastly petitioner says that the Honorable Justice of the Circuit Court of Appeals must have misunderstood or misread the transcript, as the Government did not offer or have the envelope in which Government's Exhibit 5 was enclosed and same was not received in evidence (R. 33), but the learned Justices in their opinion, (R. 55, say: "The lease assignment, *together* with the *envelope* in which the same was transmitted to the lessee, WAS ADMITTED in evidence." This error as to the envelope is important as it shows that the justices had in mind some evidence of mailing. The witness merely stated that he received the document, assignment of the recorded copy of the lease and of course he could not say it was placed in the mails in New Mexico or that the petitioner caused it to be placed in the

mails, if it was ever in the mails, as the witness was never in New Mexico and did not know the Commissioner or any person from his office.

Conclusion.

It is respectfully submitted that upon reading of the entire record this Honorable Court will grant the petition for a writ of certiorari and we believe that if the case is presented to this Court that it will find that the trial court was without jurisdiction; that there was a fatal variance and that there was no testimony of any scheme to defraud; that the mails were not used for the purpose of executing any scheme and that there was not sufficient evidence to bring the case within the statute and that the Government failed to overcome the presumption of innocence and that the trial justice should have directed a verdict of not guilty on all counts of the indictment.

Respectfully submitted,

MAYER J. SAWYER,
Attorney for the Petitioner.

Filed July 2nd, 1943.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 139

FRANKLIN PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 53–58) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 29, 1943 (R. 58–59). The petition for a writ of certiorari was filed July 2, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a fatal variance between the indictment and proof resulted from the fact that the Government's proof established the nonfraudulent character of one of the several fraudulent representations petitioner was charged with making in execution of a scheme to defraud.

2. Whether the evidence is sufficient to sustain petitioner's conviction of mail fraud.

STATUTE INVOLVED

The mail-fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom,

> whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in a 5-count indictment returned in the District Court for the District of New Mexico with causing the use of the mails in execution of a scheme to defraud, in violation of the mail fraud statute (*supra*) (R. 1–11). The scheme to defraud alleged in each count was one consisting of the making of various false and fraudulent representations and promises to induce named persons, and the public generally, to give, send, and pay money and property to petitioner for the purchase, recording, and delivery of assignments of oil leases on land located in the State of New Mexico (see R. 1–5, 8). Each count alleged that petitioner caused the mailing of a different writing in execution of the scheme to defraud (see R. 5–8, 8–11).

At the conclusion of the Government's case petitioner made a motion for a directed verdict on all counts, which was granted as to counts 1, 2, and 3 but denied as to counts 4 and 5 (R. 43;

see also R. 16). The jury found petitioner guilty on both of the latter counts (R. 12) and the court sentenced him to serve 8 months' imprisonment under each count, the sentences to run concurrently (R. 12–13).[1] The circuit court of appeals affirmed the conviction (R. 53–59).

The Government's case may be summarized as follows:

In March 1938 petitioner obtained from the Land Office of the State of New Mexico an oil lease on approximately 2,000 acres of unrestricted land in the State at a total cost of $131.47, including fees for services in connection with the procurement of the lease, the charge by the State being 5 cents an acre (R. 16–17, 40). In August 1938 he sold the lease on 160.24 acres of the land, in sections of approximately 40 acres each, to William J. Dietrich of Allentown, Pennsylvania, for $200 (R. 8–11, 32, 33, 35, 46) and in September 1938 sold the lease on 200.08 acres, also in tracts of approximately 40 acres each, to Mabel and Albert Willauer, Quakerstown, Pennsylvania, for $500 (R. 5–8, 20–21, 25, 44–45).

Petitioner effected the sale to the Willauers at a price of $2.50 an acre, as compared with the 5 cents an acre charged by the State, through representations made during repeated visits at the

[1] Apparently, the motion for a directed verdict as to counts 4 and 5 was not renewed at the close of all the evidence (see R. 43) and no motion for a new trial was filed.

Willauer home for the purpose of selling a part of his 2,000-acre oil lease. On his first visit, Mrs. Willauer told him she would have nothing to do with oil stock—that her father had invested and lost. Petitioner told her that "this oil stock was quite different." He showed Mr. and Mrs. Willauer a map of the State of New Mexico on which his various 40-acre sections were marked and picked out one section which appeared to be near two producing wells. Mr. and Mrs. Willauer were reluctant to buy, however. (R. 19–20.) Petitioner visited them again and this time said he wanted to make them rich, that they could not "lose any money in these things," that the leases were good, that there were producing wells nearby, that a big company owned the surrounding land and had already started drilling in some places, that if the company found oil they would offer the Willauers a big price for their lease, and that they, the Willauers, could not fail to make money by buying a lease (R. 19, 25, 28, 29, 30). Mrs. Willauer thought the producing wells were "maybe fifty or one hundred feet away" (R. 19). Finally, after several visits to the Willauers, petitioner "made it so strong" that Mrs. Willauer suggested to her husband that they invest $100 (R. 19–20). Petitioner "didn't want to hear about One Hundred Dollars" and continued to tell them "how we were going to make money out of this thing" (R. 20). Finally, he got them to go into partner-

ship with him on four sections, at a cost of $200 to the Willauers. Petitioner sent the lease to the Land Office in New Mexico for assignment, but it was returned, unrecorded, because it had three names on it. (R. 20.) He then persuaded the Willauers to put $200 more in the oil lease and, finally, an additional $100, making a total of $500 (R. 20, 25). Mr. Willauer signed a purchase contract which, among other things, contained the statement, "I thoroughly understand that this purchase is speculative" (R. 46–47), but he did not read the contract before signing it (R. 24, 27).

The Willauers have never received anything from the five 40-acre sections which they purchased from petitioner (R. 29). None of the sections [designated in Plaintiff's Exhibit No. 4 (R. 45), which partially is set forth at R. 5–8] were near producing oil wells. The first section was 10 miles from a hole abandoned in 1932, and in March 1938 the nearest producing oil well was about 90 miles south, in the Comanche field in Chavez County; the second section was 5 miles from a dry hole and in 1938 was about 180 miles from the nearest producing well; the third is 2 miles from a drying well abandoned in 1933 and in 1938 was 60 miles from the closest producing well; the fourth "is extremely wild-cat area," is 20 miles from an abandoned hole, and in 1938 was 90 miles from the nearest producing well; and the fifth section is 10 miles from a dry hole, completed in 1929, and in 1938 was 54 miles from a producing well.

(R. 6, 36–37.) "The fact that the hole was dry ten miles away would be indicative and would make the area very unattractive and point to it as being unlikely oil territory" (R. 40).

The sale to William Dietrich of 160.24 acres was made by similar misrepresentations. Petitioner told Dietrich that he had purchased around 1,900 or 2,000 acres in New Mexico, "that it was in a hot spot," that "we are going to make a lot of money out of it, the profits out of these leases, very enormous," that "it was good territory, very excellent territory," and that "some of the territory he had was on production he said on structure" (R. 32–34). Petitioner showed Dietrich a map and said he would let him "in on a certain location where there had been a well drilled some years ago and the company through financial difficulties never finished the well * * * the well might be producing anywhere from four months to a year, not over a year at the outside" (R. 32), and that he was going to form "a good strong company that would give us production" by selling "a lot of this valuable gas," giving the purchasers shares in the company, and combining the 2,000-acre oil lease with "productive land in Texas" which he owned and with well-located land in New Mexico which he intended to purchase (R. 33). He told Mr. Dietrich that he wished the latter to be a director in the company (R. 33, 35). Mr. Dietrich had successfully invested in oil stock previously

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but, since petitioner appeared well-informed regarding oil properties, he had "a great deal of confidence in" petitioner's "intelligence and his knowledge of oil and in his sincerity at that time" (R. 32, 35) and believed petitioner's story about the formation of a company until after petitioner "had gone from our community and never returned" (R. 33). Dietrich told petitioner, however, that his price of $100 for a 40-acre section was too high (R. 32). Petitioner then reduced the price to $50 a section (R. 32) and Dietrich paid him $200 for four 40-acre tracts (R. 35).

Like the Willauers' acreage, none of Dietrich's acreage was near a producing well. In March 1938 the first 40-acre section [designated in Plaintiff's Exhibit No. 5 (R. 46), which is set forth at R. 8–11] was 96 miles from the nearest production; the second section "is just north" of a dry hole and was 140 miles northeast of the closest production; the third section is about 9 miles from a dry hole drilled in 1933 and was approximately 60 miles north of the closest production; the fourth section "is extremely wild cat territory," and is 20 miles from a well which was completed in 1929 and abandoned (R. 9, 37–38).

No drilling has ever taken place on the Willauer or Dietrich tracts (R. 36–38).

Count 4 of the indictment alleged that petitioner caused the mailing of an oil lease assignment, together with instructions and information, by the

Commissioner of Public Lands at Santa Fe, New Mexico, to the Willauers on September 30, 1938 (R. 5–8). Mr. Willauer testified that the lease assignment [which was introduced in evidence as a part of Gov't Ex. No. 4 (R. 45) and is set forth at R. 5–7] was sent "out" by petitioner (R. 25), and Mrs. Willauer added that petitioner told them they would receive their lease through the mail (R. 24). Both Mr. and Mrs. Willauer testified that they did in fact receive the lease assignment and accompanying material through the mail (R. 20, 24, 25–26) and the envelope in which the Willauers received the lease, introduced in evidence as part of Gov't Ex. No. 4, showed that the lease assignment had been mailed on September 30, 1938, at Santa Fe, New Mexico, by the Commissioner of Public Lands, Santa Fe, New Mexico (R. 20–21, 44). The letter of transmittal and a receipt which accompanied the lease assignment when the Willauers received it revealed that the lease had been mailed to the land commissioner for "transfer and registration," accompanied by a $5 filing fee (R. 44, 45).

Count 5 of the indictment alleged that petitioner caused the mailing of a similar oil lease assignment, together with a letter of transmittal to Mr. Dietrich on August 11, 1938, at Santa Fe, New Mexico, by the Commissioner of Public Lands, State of New Mexico (R. 8–11). Mr. Dietrich testified that he and petitioner mailed the

lease to the Land Commissioner at Santa Fe in a letter box and that the lease and letter of transmittal from the land commissioner, as set out in count 5 (see R. 8–11, 33, 46) came back to him by mail (R. 33). The letter of transmittal from the Commissioner of Public Lands showed that the lease had been mailed to the land commissioner for filing, accompanied by a $5 filing fee (R. 8–9, 46).

ARGUMENT

I

Petitioner contends that there was a fatal variance between the indictment and proof, because the indictment charged that he purchased his 2,000-acre lease from a lease broker and represented to victims that he purchased it direct from the State of New Mexico, whereas the proof showed that he purchased the lease from the State and consequently did not misrepresent its source (Pet. 8–10). Although this variance did in fact exist, it furnishes no ground for further review of the case by this Court.

Petitioner's argument that the variance was fatal assumes that every variance between an indictment and the proof offered in support thereof is fatal (Pet. 10). The contrary is well established. As this Court has stated, "The true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of

the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger* v. *United States*, 295 U. S. 78, 82.

There was certainly no violation of the above requirements in the instant case. As petitioner admits (Pet. 10), the allegation as to how he acquired his 2,000-acre lease was unnecessary. And as the court below stated (R. 56), the allegation of misrepresentation in connection therewith was refuted by the indictment itself, since the leases were attached as exhibits. The representation was but one of several misrepresentations petitioner was alleged to have made in selling oil leases to the Willauers and Dietrich. (See R. 2–3, 4.) It is well settled that a conviction may be predicated upon any fraud charged in the indictment. *Dilliard* v. *United States,* 101 F. (2d) 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Cowl* v. *United States*, 35 F. (2d) 794, 798 (C. C. A. 8); *Shreve* v. *United States,* 103 F. (2d) 796 (C. C. A. 9), certiorari denied, 308 U. S. 570; *Goldstein* v. *United States,* 63 F. (2d) 609 (C. C. A. 8). Therefore, the variance did not result in a lack of protection against double jeopardy or involve any

element of surprise prejudicial to petitioner's efforts to prepare his defense. *United States* v. *Ragen,* 314 U. S. 513, 526; *Bennett* v. *United States,* 227 U. S. 333, 338–339; *Hall* v. *United States,* 168 U. S. 632, 638–640; *Montgomery* v. *United States,* 162 U. S. 410, 411; cf. *Hoke* v. *United States,* 227 U. S. 308, 324.[2]

II

There clearly is no merit in petitioner's contention that the evidence was insufficient to support the verdicts of guilt returned against him under counts 4 and 5.[3]

1. Petitioner urges that the evidence does not show that he made any false representations to the Willauers or Dietrich in selling them oil leases—that his representations were mere "salesman's boosting" based upon articles published by the State of New Mexico and upon "opinions and

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[2] There is no contention by petitioner that the jury was permitted to base their verdict against him on the alleged misrepresentation in question. Indeed, there would be no basis for any such contention, since the charge to the jury is not included in the record. (See R. 43.)

[3] Since concurrent sentences of imprisonment were imposed upon petitioner under the two counts, his conviction may be sustained under either count. *Hirabayashi* v. *United States,* No. 870, last Term, decided June 21, 1943; *Gorin* v. *United States,* 312 U. S. 19, 33; *Whitfield* v. *Ohio,* 297 U. S. 431, 438; *Brooks* v. *United States,* 267 U. S. 432, 441; *Abrams* v. *United States,* 250 U. S. 616, 619; *Evans* v. *United States,* 153 U. S. 584, 595; *Claassen* v. *United States,* 142 U. S. 140, 146. However, the evidence supports conviction on both counts, as we shall show.

honest beliefs learned through newspapers, oil journals and other sources which he had every reason to believe were authentic" (Pet. 5, 10–12). There is nothing in the record to support this argument (but cf. R. 17–18). The oil leases were being sold by the State of New Mexico at 5 cents an acre, as compared with the $2.50 and $1.25 an acre petitioner charged the Willauers and Dietrich, respectively. Since petitioner was well informed regarding the oil business (*supra,* pp 7–8), he must have known there was no valid basis for his various representations (*supra,* pp. 4–6, 7–8), including his false assurances that the leases were in active territory and would result in large profits to their purchasers. In any event, as the court below stated (R. 57–58), "Undoubtedly, the representations made by defendant were highly exaggerated and unsupported by any geological facts or data. Whether they were fraudulently made as a part of a fraudulent scheme was a question for the jury; * * *."[4]

[4] Petitioner also asserts that the truthfulness of his representations to the Willauers and Dietrich that they could make large profits on the oil leases he had for sale was shown by the fact that shortly after the Willauers purchased a lease from him they had an opportunity to sell it for $1,000 (Pet. 10, 12). The offeror was a Mr. Lartern, who is now in a penitentiary (R. 26). However, petitioner represented that the large profits would result from an alleged increase in the *value* of the leases—a fact which was refuted by the proof. His representations were none the less false merely because some other person, either in good or bad faith, was willing to supplant the Willauers as the victim on the deal.

2. Contrary to petitioner's contention (Pet. 5–8, 12), the proof clearly supports the charges, contained in counts 4 and 5 of the indictment, that petitioner "caused" the mailing of oil-lease assignments to the Willauers and Dietrich by the Land Commissioner, Santa Fe, New Mexico, in furtherance of the alleged scheme to defraud.

There can be no question that both the count 4 and count 5 lease assignments were mailed at Santa Fe, New Mexico, by the Land Commissioner, as petitioner planned. The Willauers testified that they received the count 4 lease assignment through the mails and the envelope in which they received it showed that it had been mailed at Santa Fe, New Mexico, by the Commissioner of Public Lands, Santa Fe, New Mexico (*supra,* p. 9). Mr. Dietrich testified that he received the count 5 lease assignment through the mail and the letter of transmittal accompanying it showed that it had been sent by the Land Commissioner at Santa Fe, New Mexico (*supra,* pp. 9–10). The evidence of mailing at Santa Fe, New Mexico, by the Land Commissioner was therefore, in both instances, more than adequate. Cf. *Steiner* v. *United States,* 134 F. (2d) 931, 934 (C. C. A. 5), certiorari denied June 14, 1943, No. 1037, last term; *Gantz* v. *United States,* 127 F. (2d) 498, 502 (C. C. A. 8), certiorari denied, 317 U. S. 625; *McIntyre* v. *United States,* 49 F. (2d) 769 (C. C. A. 6).

That petitioner "caused" the alleged uses of the mails is clear. Mr. Willauer testified that petitioner sent "out" the count 4 lease assignment and Mr. Dietrich testified that he and petitioner deposited the count 5 lease assignment in a mail box, directed to the Land Commissioner, Santa Fe, New Mexico. Both the count 4 and count 5 mailings show on their face that the lease assignments had been forwarded to the Land Commissioner for filing with the Land Office, a filing fee of $5 having accompanied each assignment. (*Supra,* pp. 9, 10.) Since petitioner told the Willauers that they would receive their lease through the mail (*supra,* p. 9) he plainly contemplated that the Land Commissioner at Santa Fe, New Mexico, would return the lease assignments, or duplicate copies thereof, to the Willauers and Dietrich. Petitioner therefore "caused" the count 4 and count 5 mailings by the Land Commissioner at Santa Fe, New Mexico. *United States* v. *Kenofskey,* 243 U. S. 440, 442–443; *Hastings* v. *Hudspeth,* 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Hart* v. *United States,* 112 F. (2d) 128, 131 (C. C. A. 5), certiorari denied, 311 U. S. 684; *United States* v. *Weisman,* 83 F. (2d) 470, 472–473 (C. C. A. 2), certiorari denied, 299 U. S. 560; *Silkworth* v. *United States,* 10 F. (2d) 711, 719 (C. C. A. 2), certiorari denied, 271 U. S. 664.

Under the circumstances, it is clear that petitioner's scheme to defraud contemplated receipt by his victims of their oil lease assignments. The formal completion of each assignment of a portion of his 2,000-acre lease kept him free from suspicion for the time being and enabled him to perpetrate his scheme on others. The mailing of the lease assignments by the Land Commissioner of the State of New Mexico was therefore an integral part of his scheme and did not occur, as he contends (Pet. 7), "after the entire transaction had been fully and completely consummated in the State of Pennsylvania." *United States* v. *Kenofskey,* 243 U. S. 440, 443; *Mitchell* v. *United States,* 126 F. (2d) 550, 554 (C. C. A. 10), certiorari denied, 316 U. S. 702; *Hastings* v. *Hudspeth,* 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Creech* v. *Hudspeth,* 112 F. (2d) 603, 606 (C. C. A. 10); *Bogy* v. *United States,* 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Corbett* v. *United States,* 89 F. (2d) 124, 125–126 (C. C. A. 8); *Lewis* v. *United States,* 38 F. (2d) 406, 416 (C. C. A. 9); *Brady* v. *United States,* 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Newingham* v. *United States,* 4 F. (2d) 490, 491–492 (C. C. A. 3), certiorari denied, 268 U. S. 703.

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important ques-

tion of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 139

FRANKLIN PERRY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

MEYER J. SAWYER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 139

FRANKLIN PERRY,

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vs.

THE UNITED STATES OF AMERICA.

ANSWER TO RESPONDENT'S BRIEF IN OPPOSITION.

The respondent in its brief assumed that there were only two questions presented to this Court in the petitioner's petition and brief, there are however, three matters of law and of fact presented, to wit:

1. The variance between the allegations in the indictment and the proof.

2. Matter of Jurisdiction, in that there was no evidence of mailing or of causing the Mails to be used, sufficient to justify the verdict.

3. There was not sufficient evidence of fraud and misrepresentation to justify the court below in having submitted the case to the jury.

Statement.

To get the facts and the law squarely before this Court the petitioner believes that a short statement of the case should be made and in this regard says:

That the State of New Mexico has for many years been leasing oil and gas lands to individuals and corporations

and that within the last ten years major oil companies have leased and are now holding under lease many millions of acres in this State; that practically all of the Southeastern portion of the State is in the Permian Formation and that from the standpoint of Geology could be productive oil and gas lands; that acreage which sold at one time for a few cents per acre, later sold for thousands of dollars per acre and that many fortunes were made by purchasing land in New Mexico ahead of the drilling and with this in mind the petitioner herein purchased, direct from the State of New Mexico some 2,000 acres of what the State set aside as oil and gas lands, and resold the same to prospective purchasers in small lots and that the Prosecution claims that in selling same petitioner made misrepresentations and the petitioner claims that he sold such acreage solely as speculative and that he represented the same as such and that in every sale the purchaser signed a receipt in which was this clause: "I thoroughly understand that this purchase is speculative". (Defendant's Ex. 3, Tr. 46) and the petitioner claims that his only representations were those obtained from the maps, oil journals and magazines, all of which were being sent through the mails daily and most of which were approved by the sovereign State of New Mexico.

Argument.

1. VARIANCE. The principal allegation in the indictment of misrepresentation is/was that the petitioner represented to prospective buyers that he was selling leases which he had obtained direct from the State of New Mexico, when in truth and in fact he had no such leases, but did have leases which he sold to the persons named in the indictment and that said leases were purchased by petitioner "From an oil lease broker located in Santa Fe". The inference being that the leases were of an inferior value.

The admitted proof is that the petitioner did have State

leases which he purchased direct from the Sovereign State of New Mexico and that he never had, sold, or offered for sale a single acre which was "Obtained from an Oil Broker."

The respondent's brief admits this variance, but claims same to be immaterial. Now the petitioner, as defendant, entered the lower court to meet this main issue and relied upon the falsity of this allegation and the prosecution, by its own witnesses, Piatt (Tr. 16-17) and Schuts (Tr. 31), proved that the defendant purchased and held the oil and gas leases direct from the State of New Mexico and had never had or sold any leases which he had "Purchased and obtained from an oil lease broker located in Santa Fe", therefore the petitioner was taken by surprise and the variance was fatal and the trial court should have directed a verdict for the defendant. In the long experience of the attorney for the petitioner he has never heard of a more complete and a more fatal variance, for the proof was directly opposite to the allegations in the indictment.

2. JURISDICTION. Congress in enacting section 215 of Criminal Code, generally known as the Mail Fraud Section, had in mind cases where persons were induced to purchase goods, wares and merchandise, through the mails, send money as the result of advertisements or letters, for the payment of articles and to either not receive such or to receive inferior goods. We admit that the statute has been expanded to cover almost any case where articles have been sold upon fraudulent representations and the mail in anywise used, but in this case the trial court went far beyond the statute and if such expansion continues no person will be safe in buying or selling through the mails and we believe that this Court should grant the writ of certiorari and establish a precedent for the guidance of Federal Courts.

The prosecution, in this case, does not claim that the petitioner, himself, mailed the letters set forth in the indictment and the proof failed to show that the petitioner was ever in New Mexico or within the jurisdiction of the trial court, but the allegation in the indictment is "*That after the sale of the said oil leases to the victims,* defendant did use and *CAUSE to be used* the Post Office Establishment of the U. S." Mark the words "AFTER THE SALE OF SAID LEASES". The admitted facts are that the petitioner, while in the Commonwealth of Pennsylvania, sold the leases mentioned in the indictment; that petitioner never left the Commonwealth of Pennsylvania; that the petitioner did not know the Commissioner of Public Lands of New Mexico and that there was not one single iota of evidence produced at the trial to show that the petitioner did one act to cause the Commissioner of Public Lands, New Mexico, to do or refrain from doing any act and particularly was there no evidence to show that petitioner ordered, requested or caused the said Commissioner to use the mails. In this connection we are met with a well settled principle of law, to wit: when the prosecution, in a criminal case, has it within its power to produce witnesses, that if produced would prove a necessary and material fact or link in its case and failed to produce and call such witnesses, the presumption is that if such witnesses were called they would testify contrary to the interest of the prosecution or that their testimony would fail to establish the allegation of the indictment.

HERE WE HAVE THE OFFICE OF THE COMMISSIONER OF PUBLIC LANDS OF NEW MEXICO WITHIN THE VERY SHADOW OF THE BUILDING IN WHICH THE TRIAL WAS BEING CONDUCTED AND THE PROSECUTION DID NOT CALL HIM OR ANY MEMBER OF HIS OFFICE TO TESTIFY AND YET THE GOVERNMENT ALLEGED THAT THE DEFENDANT CAUSED THIS COMMISSIONER TO DO THE VERY ACT WHICH IS THE GRAVAMEN OF THE ALLEGED CRIME.

Respondent's brief pages 9 and 10 the pleader says: "The * * * mailing at Santa Fe, * * *, BY THE LAND CO . . . ISSIONER" and "That the lease * * * had been mailed * * * at Sante Fe, * * *, BY THE COMMISSIONER of Public Lands (R. 20-21, 44)."

The petitioner says that if the Commissioner of Public Lands and all members of his staff had been called they would each and every one have testified that the petitioner had absolutely nothing to do with the mailing of a DUPLICATE COPY of the lease owned by the persons named in the indictment, but would have been forced to have testified that these duplicate copies are always sent to the owners of State Leases, regardless of any influence, because under the laws of the State when a lease is recorded, whether delivered to the Commissioner in person, sent by messenger or through the mails, the Commissioner causes a duplicate copy of such lease to be mailed to the party or parties named in such lease.

In this regard there is another firmly established principle of criminal law, to wit: Where there are two methods of accomplishing an act, one a criminal offense and the other an innocent act, without proof that the criminal method was used the court and jury must find that the accused used the innocent method, because a man is presumed to have done the act innocently unless proven to have done it criminally. Here the original lease was delivered to the Commissioner of Public Lands, with no evidence to show that it was mailed to him by the petitioner or by any person and there is no presumption that it was mailed to him or that the mails were used, if so why was the Commissioner not called to testify that he received the leases through the mails? The Commissioner was just across the street from the Federal Court and the prosecution had it within its power to prove this alleged mailing, if in fact, there was any mailing. In this case we are presuming that the petitioner

mailed the original lease to the Commissioner, again that he instructed the Commissioner to use the mails in sending the duplicate lease to the lessees and again that the Commissioner did actually mail same. Three presumptions without the slightest proof.

The laws of New Mexico require the Commissioner to execute and deliver to all lessees of public lands a DUPLICATE COPY of their lease, but this is not to perfect the lessees' title, it is merely notice to them that the lease has been recorded and if no duplicate copy had been sent to the persons named in the indictment their titles would not have been defeated. This act on the part of the Commissioner is not a part of the sale, it is a memorandum and in no wise affects the title. The title to these leases is like that of any deed or lease, good of record. The recording completes the title and any memorandum made thereafter is not "FOR THE PURPOSE OF (Statute, executing such scheme)" aiding in completing a sale. The sale was made in Pennsylvania, totally consummated there and the persons named in the indictment did not have to have duplicate copies of their leases to complete their titles and where the mails were used after the alleged fraud and not in furtherance thereof and merely incidental, there can be no prosecution under Sec. 215.

Dyhre v. *Hudspeth*, 106 F. (2d) 286;
U. S. v. *Dale*, 230 F. 750;
Bowers v. *U. S.*, 244 F. 641;
Smith v. *U. S.*, 208 F. 125;
Brooks v. *U. S.*, 146 F. 223;
U. S. v. *McCroy*, 175 F. 802.

The gist of the offense is the use or abuse of the mails in perfecting a fraud and not the fraud itself. Federal Courts have no jurisdiction unless the mails are used in furtherance of the scheme to defraud.

Olsen v. *U. S.*, 287 F. 85;
U. S. v. *Jones*, 10 F. 469.

The gist of the offense is the abuse of the mails and the letter itself is the *corpus delicti*. Does the prosecution honestly and sincerely claim that any letter written and mailed by the COMMISSIONER OF PUBLIC LANDS of the Sovereign State of New Mexico, in the line of duty, could be the *corpus delicti* of a crime? No claim is made that the defendant wrote or received any letters, but the only claim is of an ACT DONE BY a reputable officer of one of our sovereign States as a part of the duties of his office. Could such a letter, if proven to have been written at the instance of the defendant, possibly be the *corpus delicti* of a crime, if so, the said commissioner, must be necessarily a party to a crime? The commissioner was in Santa Fe, New Mexico, at the time of the trial, just across the street from the Federal Court. WHY WAS HE NOT CALLED to prove that such a letter was, in fact, written or sent through the mails? The presumption is that no such letter was caused to be sent through the mails by the defendant. And too, the mere mailing of a letter is no evidence of fraud. The letter speaks for itself, in this instance the only alleged mailing was done after the alleged sale had been wholly and entirely consummated. The transaction was complete even without the lease being recorded and the recording is/was merely for the protection of the lessee and did not weaken or better his title.

Dyhre v. *Hudspeth, supra,*
U. S. v. *Mitchell,* 36 F. 493,
Erbaugh v. *U. S.,* 173 F. 433,
McLendon v. *U. S.,* 2 F. (2nd) 660.

The indictment must show that the fraudulent scheme was "To be effected" through the mails, as an essential part, not as a mere adjunct or incident, and that the original design contemplated and embraced this. Certainly the mailing of a duplicate copy of a recorded lease as a part

of the duties of his office is no part of an original design or scheme to defraud.

U. S. v. *Clark*, 121 F. 190.

There is not the slightest question of doubt in this case that the sending of a duplicate copy of a State lease by the Commissioner of Public Lands was a "MERE INCIDENT" in the transaction which the petitioner had with the parties named in the indictment and that the mailing was not a part of any original design to defraud nor was it even contemplated by the petitioner as he either did or could have delivered the leases to the buyers in Pennsylvania at the time of the sales and these persons could have sent same for recording. The leases may have been or could have been carried by methods other than the mails to the Land office for recording and the Commissioner could have, himself, adopted the mails for sending duplicates.

3. NO EVIDENCE OF FRAUD, or devising a scheme to defraud. The facts in this case show plainly that the petitioner purchased from the State of New Mexico leases on what the State claimed were oil and gas lands; that he purchased same direct from the State and sold same under representations that were contained in maps, newspapers and oil journals published in the United States which were daily in circulation through the mails; that his only representations to secure a sale were: that the leases were obtained direct from the State of New Mexico and this was admitted as a fact, although in the indictment claimed to be false; that the lands were on Structure and this too is admitted as all of Southeastern New Mexico is in the Permian basin and is geologically speaking productive territory and the proof showed that major oil companies held millions of acres in this territory in which the leases of petitioner were located; that leases which petitioner had for sale were in active territory and this is mere boosting, salesmanship

talk, not actual misrepresentation; that the lands in the immediate territory would be developed within four months or one year, of course this is a mere opinion and the final alleged misrepresentation is that the buyers could or might make LARGE profits if they purchased leases from the petitioner and the uncontradicted evidence offered by the prosecution's own witness was that the leases purchased for $500.00 could have been sold for $1,000 within a few months after the purchase and this is large profits, 100% within a short time (Tr. p. 27).

In the transcript page 27, the trial court remarked, after most of the testimony was in and regarding the testimony of possibly the most important Government witness, "That the witness has not testified as to any misrepresentations and that the only thing appearing from the witness's statement was that the defendant had indulged in SALESMANSHIP TALK, THAT IT WAS JUST BOOSTING TALK." And the petitioner says that in the entire record there is not a scintilla of evidence that goes beyond allowable salesmanship and boosting, it is not even gross exaggeration. The brief of the respondent says, speaking of the representations made by the petitioner to induce sales, "In any event, as the court below stated (R. 57-58), 'UNDOUBTEDLY, the representations made by the defendant WERE HIGHLY EXAGGERATED.' "

> A salesman opens his mouth wide and the buyer closes his mouth tight, are either to be condemned for driving a close bargain?

A false representation does not amount to fraud unless it be made with fraudulent intent.

Yusem v. *U. S.*, 8 F. (2nd) 6.

Knowledge and belief as to the falsity of a representation must be shown. Petitioner relying upon representations made by a sovereign State, to-wit that the leases were on lands likely to be productive oil and gas lands

and that major oil companies had leased and were holding as oil and gas lands millions of acres of land in and near the leases which petitioner was selling and that the leases were in the Permian Structure, surely would be justified in representing all that is alleged in the indictment as his belief.

Bentel v. *U. S.*, 13 F. (2nd) 327,
Corliss v. *U. S.*, 7 F. (2nd) 455,
Rudd v. *U. S.*, 173 F. 914,
Harrison v. *U. S.*, 200 F. 662,
Horn v. *U. S.*, 182 F. 721,
Sandals v. *U. S.*, 213 F. 569,
McDonald v. *U. S.*, 241 F. 793,
Moore v. *U. S.*, 2 F. (2nd) 904,
Gold v. *U. S.*, 36 F. (2nd) 16,
Stunz v. *U. S.*, 27 F. (2nd) 575.

Conclusion.

This Court should allow the writ of certiorari to review the judgment of the lower court as there was no jurisdiction, a fatal variance, no evidence of fraud or devising a scheme to defraud and lastly there was absolutely no evidence to show that the petitioner caused the mails to be used and unless this Honorable Court admits a review of the law and the facts as they show from the transcript this petitioner will suffer the ignominy of being convicted of a crime when in truth and in fact he is not guilty thereof.

Respectfully submitted,

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Filed August 30, 1943.

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